No. 275

In the Supreme Court of the United States

OCTOBER TERM, 1951

UNITED STATES OF AMERICA EX REL. HUBERT JAEGLER, PETITIONER

v.

UGO CARUSI, COMMISSIONER OF IMMIGRATION AND NATURALIZATION AND CARL ZIMMERMAN, DISTRICT DIRECTOR FOR DISTRICT NO. 2, PHILADELPHIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR RESPONDENTS

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This memorandum is directed to the issue raised in petitioner's "Memorandum and Supplement to Brief of Petitioners sur Petition for Certiorari," recently filed in this Court.

As petitioner points out, on October 19, 1951, the President signed Public Law 181, 82d Congress, the "Joint Resolution to terminate the state of war between the United States and the Govern-

ment of Germany." The President has also issued a Proclamation proclaiming that the state of war between this country and Germany terminated as of October 19, 1951. Proclamation 2950, 16 Fed. Reg. 10915. Petitioner's claim is that this formal ending of the war with Germany ended all power in the President or the Attorney General to remove him, a German national, under the Alien Enemy Act of 1798.

We recognize the force of the contention that, regardless of the prior issuance of a valid removal order, the power of the President (and his delegates), under the 1798 Act, actually to remove an alien enemy lasts only so long as a declared war is in existence and peace has not been formally proclaimed. Cf. *Ludecke* v. *Watkins*, 335 U.S. 160, 166-170; *United States ex rel. Kessler* v. *Watkins*, 163 F. 2d 140, 142-143 (C.A. 2); *United States ex rel. Ludecke* v. *Watkins*, 163 F. 2d 143, 144 (C.A. 2).

On the other hand, it may very well be that the removal power does not terminate with respect to an enemy alien, like petitioner, against whom a valid removal order was issued during the declared war but who could not physically be removed from the country during that period because of the pendency of habeas corpus proceedings brought on his behalf. Petitioner was formally ordered removed in May 1946, and action to effect this order was taken in April 1947. Habeas corpus proceedings were filed in May 1947, and the four and one-half

years since that time have been taken up with petitioner's attempt, through habeas corpus, to prevent his removal. In view of contentions as to the possible applicability of Rule 45 of the Rules of this Court—"Custody of Prisoners Pending a Review of Proceedings in Habeas Corpus"[1]—the Government did not remove petitioner to Germany while his habeas corpus proceedings were pending in the district court, the court of appeals, or this Court. The delay in execution of the removal order is thus attributable solely to petitioner and not to the Government; and a strong argument can be made that, at least in this type of case, the removal power does not terminate with the ending of the war. Whether or not the General Savings Clause (1

[1] "1. Pending review of a decision refusing a writ of habeas corpus, the custody of the prisoner shall not be disturbed.

"2. Pending review of a decision discharging a writ of habeas corpus after it has been issued, the prisoner may be remanded to the custody from which he was taken by the writ, or detained in other appropriate custody, or enlarged upon recognizance with surety, as to the court or judge rendering the decision may appear fitting in the circumstances of the particular case.

"3. Pending review of a decision discharging a prisoner on habeas corpus, he shall be enlarged upon recognizance, with surety, for his appearance to answer and abide by the judgment in the appellate proceeding; and if in the opinion of the court or judge rendering the decision surety ought not to be required the personal recognizance of the prisoner shall suffice.

"4. The initial order respecting the custody or enlargement of the prisoner pending review, as also any recognizance taken, shall be deemed to cover not only the review in the intermediate appellate court but also the further possible review in this court; and only where special reasons therefor are shown to this court will it disturb that order, or make any independent order in that regard."

U.S.C., Supp. IV, 109)[2] is strictly applicable, there is good reason to apply here its general policy of continuing in effect all sanctions for a "penalty, forfeiture, or liability" incurred under a repealed or temporary statute. Cf. *United States* v. *Powers*, 307 U. S. 214, 217.[3]

In these circumstances, if the Court does not desire to decide the matter for itself after briefs and argument, we suggest that the case be remanded to the Court of Appeals for the Third Circuit for consideration of the effect of Public Law 181, approved October 19, 1951, on petitioner's status and the Attorney General's removal powers. This has been the course followed in other instances in which a new statute has been suggested by one of the

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[2] 1 U.S.C., Supp. IV, 109 provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. *The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.* [Emphasis supplied.]

[3] In the Government's main brief in *Ahrens* v. *Clark*, No. 446, October Term, 1947, at pp. 17-18, fn. 14, as well as in the memorandum for the respondent in that case in answer to the petitioners' motion for a stay under Rule 45 (1), the effect of Rule 45 in this type of case was discussed, and it was pointed out that "The problem would reach its most acute point if petitioners continue their litigations until a formal treaty of peace terminates the state of war."

parties as vitally affecting the case. *Molsen* v. *Young*, 340 U. S. 880 (Subversive Activities Control Act of 1950); *Estate of Schroeder* v. *Commissioner*, 338 U. S. 801, 884 (Technical Changes Act of October 25, 1949); *Woods, Housing Expediter* v. *Durr*, 336 U. S. 942, 941 (Housing and Rent Act of 1949); *Mitchell* v. *White Consolidated, Inc.*, 336 U. S. 958 (amended Rule 73(a) of the Rules of Civil Procedure); *Edward G. Budd Mfg. Co.* v. *National Labor Relations Board*, 332 U. S. 840 (Labor Management Relations Act of 1947); *Alaska Juneau Gold Mining Co.* v. *Robertson*, 331 U. S. 823, 793 (Portal-to-Portal Act of 1947); *149 Madison Avenue Corp.* v. *Asselta*, 331 U. S. 795 (Portal-to-Portal Act of 1947); *Sioux Tribe of Indians* v. *United States*, 329 U. S. 680, 684, 685, 758 (Indian Claims Commission Act of August 13, 1946).[4]

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

NOVEMBER 1951.

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[4] Only nine German nationals, including petitioner, are now under removal orders issued pursuant to the Alien Enemy Act of 1798.

APPENDIX

PUBLIC LAW 181—82D CONGRESS
CHAPTER 519—1ST SESSION
H. J. RES. 289

JOINT RESOLUTION

To terminate the state of war between the United States and the Government of Germany.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war declared to exist between the United States and the Government of Germany by the joint resolution of Congress approved December 11, 1941, is hereby terminated and such termination shall take effect on the date of enactment of this resolution: *Provided, however,* That notwithstanding this resolution and any proclamation issued by the President pursuant thereto, any property or interest which prior to January 1, 1947, was subject to vesting or seizure under the provisions of the Trading With the Enemy Act of October 6, 1917 (40 Stat. 411), as amended, or which has heretofore been vested or seized under that Act, including accruals to or proceeds of any such property or interest, shall continue to be subject to the provisions of that Act in the same manner and to the same extent as if this resolution had not been adopted and such proclamation had not been issued. Nothing herein and nothing in such proclamation shall alter the status, as it existed immediately prior hereto, under that Act, of Germany or of any person with respect to any such property or interest.

Approved October 19, 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1951 974329